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| UNITED STATES OF AMERICA<br><br>v.<br><br>SALIM AHMED HAMDAN | ) | **DEFENSE RESPONSE TO PROSECUTION MOTION BARRING EXPERT WITNESSES**<br><br>14 October 2004 |

1. Timeliness. This motion response is being filed in a timely manner.

2. Defense Position on Prosecution Motion. The Defense Opposes the Prosecution's motion to hide the law and history from the commission's members by barring relevant evidence from the leading law professors in the world on the meaning of the Geneva Conventions, United States military law, the Uniform Code of Military Justice, and the United States Constitution. These are not "legal commentators" seeking to direct the Commission to a certain result, but rather the nation's most serious scholars of what the law *is*. In an attempt to invent a categorical ban on such evidence which does not exist, the Prosecution bends legal authority and cites irrelevancies. This inapposite case law must rely on a mischaracterization of the Defense's proposal, because in actuality there is absolutely no legal reason – nor a prudential one – to deny the Defense's proposal.

Each of the six identified witnesses is a leading expert in his or her field. By calling them, the Defense seeks to provide the commission with the most objective, scholarly views on what the law actually is, and what the history behind the law reveals. None are "defense witnesses" in that they will not testify as to the particular facts at issue in this case or apply the law to Mr. Hamdan's facts – a distinction the Prosecution has ignored. They are men and women of the highest integrity and professionalism, and can be expected to take positions that are sometimes contrary to those of the defense. They developed their expertise in the law over years of careful study and experience, all undertaken independently from this case and from the defense's position in particular.

The Defense firmly believes that without the testimony of the six witnesses it wishes to call, the military commissions will be fundamentally flawed from the outset. By illuminating the meaning of the various laws and provisions at issue, the six experts will render the Presiding Officer more capable of evaluating Mr. Hamdan's case, while simultaneously ensuring that he, as the Commission's only lawyer, does not exercise undue influence over the non-lawyers who make up the rest of the Commission.

The Defense understands why the Prosecution fears this expert testimony – the Prosecution would prefer that the Commission not understand the legal restraints on the President's convening of military commissions. But that is not a reason to bar this testimony. Moreover, the prosecution's motion poses numerous logistical problems. As a legal motion, it can only be decided by the commission itself, and since the commission itself can only meet in Guantanamo, the expert witnesses would have to be transported to

Guantanamo – to their great inconvenience and at huge expense to the American Government – at which point they may be barred from testifying altogether.

At bottom, this is a motion to hide relevant evidence from the commission. Unlike the evidence the Prosecution seeks to introduce, which is often prejudicial and uncorroborated, the testimony at issue is the product of neutral, objective scholarship of the highest level. There is absolutely no reason why such evidence would unfairly hurt one party. The motion should be denied.

3. Facts.

a. On October 1, 2004, the Defense gave notice of a range of 21 witnesses as experts in the fields of law at issue in this case. As the motions themselves made clear, the defense never intended to call 21 witnesses. Rather, they gave the prosecution notice of the law professors around the country who have expertise in these highly specialized issues, and began checking on their availability for participation at Guantanamo.
b. On October 11, 2004, as per the Order of the Presiding Officer, the Defense submitted a list of six names as expert witnesses to be called for the Defense next month. Five of the six are the leading law professors in the country on the particular history and issue involved in the specified motions; the sixth witness is a former General with significant experience in the area of the implementation of the Geneva Conventions
    a. Bruce Ackerman is Sterling Professor of Law, Yale Law School.
    b. Anne-Marie Slaughter is the Dean of the Woodrow Wilson School of Public and International Affairs, Princeton University.
    c. George Fletcher is the Cardozo Professor of Jurisprudence, Columbia University Law School.
    d. Allison Danner is Associate Professor of Law, Vanderbilt University
    e. Jordan Paust is Law Foundation Professor, University of Houston Law Center.
    f. General David Brahms was responsible for POW matters with respect to Vietnam.
c. The Prosecution misrepresents the positions of various witnesses that they contacted. For example, Professor Slaughter did *not* say that her "expert opinion, consistent with the Prosecution's position, is that members and associates of al Qaida, such as the Accused, are ***not*** protected by the Geneva Conventions." Pros. Motion at 2. Instead, Professor Slaughter told the Prosecution in that phone conversation that her view was that the Geneva Conventions were not written with Al Qaeda in mind, but that this did not create a legal black hole where no international law protected them. She explained to the prosecution that when gaps arise in the coverage of the Geneva Conventions, that the starting point for analysis must be the animating purpose behind the Conventions.
d. The Prosecution similarly ignores the position of Professor Paust. Professor Paust is the leading American authority on the relationship between the Uniform Code of Military Justice (UCMJ) and military commissions. He is being called to explain why the UCMJ, including its speedy trial provision,

binds the military commission. Notably, the views of Professor Paust directly contradict the stated position of the Presiding Officer on this legal issue.

e. Neither Professor Paust nor Dean Slaughter are being called to testify as to whether a specific violation, either of international law or the UCMJ, exists in the specific Hamdan case. Rather, they will explicate to the commission what the relevant law and history behind the law *is*.
f. In any event, the fact that there is disagreement as to what a particular witness believes is not a reason to bar their testimony, but precisely the reason why it must be introduced.
g. On 13 October, 2004, the Prosecution issued six formal denials of the witness requests, adding a new reason: that the Defense has not provided a full statement of what the witness is likely to say. The Defense has already set forth the relevance of each expert, as well as their personal knowledge of the specific issue of concern in the Motions, in its 11 October witness requests and their accompanying C.V.'s, which detail their published work on the issues facing the commission.
    a. Because they are not factual experts, it would be highly inappropriate to submit a detailed account, first person or otherwise, of what precisely each of them would say when called before the commission. The Defense has briefly summarized the scholarly positions that each witness has taken in their published and otherwise available works, and has explained why their views bear on the work of the commission. But it has not sought out to have a transcript or testimony in advance precisely because the testimony is independent of the Defense. The Defense would be willing, should the Presiding Officer or the Commission so authorize, to obtain such statements from each of the witnesses.
    b. As the leading treatise on rules of evidence in international military tribunals has said, "[t]he modern tribunals have relied extensively on live evidence" and "[r]eliance on expert testimony has also been significant." Judge Richard May & Marieke Wierda, International Criminal Evidence 208 (2002). At the same time, experts must be independent. Id., at 199. The Defense has sought to bring the leading minds in the nation today to the commissions, and has not previewed their testimony for precisely this reason.

4. <u>The Law Requires Rejecting This Motion to Hide Relevant and Nonprejudicial Evidence.</u>

    a. The prosecution has not a single case to support their motion. Not one case they cite addresses the barring of law professors' testimony from a body composed of lawyers and nonlawyers. In fact, the cases they cite – as well as many they ignore - suggest the contrary.
    b. Courts of all types – U.S. federal civilian courts, military courts, and international courts – *routinely* admit the testimony of experts in both domestic and international law. "Merely being a lawyer does not disqualify one as an expert witness." Askanase v. Fatjo, 130 F.3d 657, 672 (5th Cir. 1997).

c. In U.S. courts, admitting expert legal testimony is a longstanding tradition – particularly in the field of international law. In *The Paquete Habana*, decided over one hundred years ago, the Supreme Court of the United States declared: for the purpose of ascertaining and administering international law, "resort must be had to the customs and usages of civilized nations; and, as evidence of these, *to the works of jurists and commentators*, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. *Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is*." 175 U.S. 677, 700 (1900) (emphasis added). This language was affirmed by the Supreme Court just a few months ago. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739 , 2766-67 (2004) (citing above quotation).

d. Under the Supreme Court's guidance in *The Paquette Habana*, so many federal courts have heard and relied upon experts in international law that it would be impossible to list them all here. *See, e.g.*, Fernandez-Roque v. Smith, 622 F. Supp. 887, 901-02 (N.D. Ga. 1985) (explaining that the Court had conducted an evidentiary hearing to hear testimony of international law professors "because expert testimony is an acceptable method of determining international law"); *see also* Grupo Protexa, S.A. v. All Am. Marine Slip, 20 F.3d 1224, 1241 (3d Cir. 1994) ("In reaching its conclusions, the district court considered testimony regarding the validity of the order under Mexican and international law from witnesses produced by both sides, and we consider such testimony integral to our present decision.");United States v. Royal Caribbean Cruises, 11 F. Supp. 2d 1358, 1372 (S.D. Fla. 1998) (relying upon expert testimony in ascertaining customary international law); Navios Corp. v. The Ulysses II, 161 F. Supp. 932 (D. Md. 1958) (comparing the testimony of both parties' experts in international law).

e. The practice of receiving testimony from international law experts is also common in military courts. *See*, e.g., United States v. New, 50 M.J. 729 (C.C.A. 1999); United States v. Rockwood, 48 M.J. 501, 505 n.6 (C.C.A. 1998).

f. The Statute of the International Court of Justice goes even further, recognizing that besides conventions, international custom, and general principles of international law, the Court may look to "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the *determination* of rules of law." Article 38(1) (emphasis added).

    a. In fact, in *Kunarac, Kovac and Vukovic* (IT-96-23) & (IT-96-23/1), 11 Sept. 2000, at 5364-93, available at http://www.un.org/icty/transe23/000911it.htm, the Tribunal heard the expert testimony of Professor Stanko Bejatovic from Belgrade Law School, as to the elements of rape.

g. Federal courts also regularly hear experts on complex matters of domestic law. *E.g.*, Huddleston v. Herman & MacLean, 640 F.2d 534, 552 (5th Cir. 1981) (permitting expert testimony as to "boilerplate" language in securities industry); Sharp v. Coopers & Lybrand, 457 F. Supp. 879, 883 (E.D. Pa. 1978) (accepting testimony of law professor expert in federal income taxation). In *United States v. Garber*, 607 F.2d 92, 97 (5th Cir. 1979), a federal court of appeals actually overturned the lower court for *failing* to admit defendant's proffered legal expert testimony on income tax law: "We hold that the combined effect of the trial court's evidentiary rulings excluding defendant's proffered expert testimony and its requested jury charge prejudicially deprived the defendant of a valid theory of her defense . . . [B]ecause the district court refused to permit . . . the expert for the government, and . . . the expert for the defense, to testify and because it reserved to itself the job of unriddling the tax law, thus completely obscuring from the jury the most important theory of Garber's defense that she could not have willfully evaded a tax if there existed a reasonable doubt in the law that a tax was due her trial was rendered fundamentally unfair." In other words, to refuse to admit this evidence creates the possibility that the final decision of this commission will be overturned on appeal.
    a. Similarly, in *In re Madeline Marie Nursing Homes*, 694 F.2d 433 (6th Cir. 1982), the Court found that the bankruptcy court's failure to avail himself of expert legal testimony on Ohio's Medicaid scheme "rendered it impossible for the court to reach an appropriate decision." *Id*. at 440. It stated, "We believe that when the legal inquiry extends to a complex scheme . . . a court should not hesitate to seek out all of the practical assistance it can obtain in its function as ultimate determiner of the law. Id. at 445. When legal matters are as complicated as they were in *Garber* and *Madeline Marie Nursing Homes* and not written down in a federal statute, admitting expert legal testimony may be imperative.
h. Contrary to the Prosecution's claims, the standard for admitting experts – legal or otherwise – is a flexible one characterized by pragmatism. Rule 702 of the Federal Rules of Evidence reads, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The essential inquiry in a decision to admit expert testimony (in addition to reliability, which is not at issue in this matter) is helpfulness to the trier of fact. *See, e.g.*, *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 591 (1993); *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988), *cert. denied,* 488 US 1008 (1989); Fed. R. Evid. 702 advisory committee note.
i. A trial judge has broad power to admit an expert's testimony. *Haarhuis v. Kunnan Enters., Ltd.*, 177 F.3d 1007 (D.C. Cir. 1999)

(finding proper the qualification of an expert in Chinese and international law, stating that "the decision whether to qualify an expert witness is within the broad latitude of the trial court . . . ."); *Hayter v. City of Mt. Vernon*, 154 F.3d 269 (5th Cir. 1998) ("Trial courts have broad discretion in rulings on the admissibility of expert opinion evidence . . . .").

j. Because the Commission will be ruling on matters of great complexity in many fields of law, the testimony of renowned experts in those fields will certainly be helpful – if not invaluable – in reaching legally sound conclusions. And because the rules of evidence in a commission are even more permissive than in federal court (so long as no prejudice results to one side), the evidence *must* be admitted.

5. Analysis

a. The statement of probative value for each of the six experts is explicitly made in each of the witness requests of 11 October 2004. Each meets the standard criteria to qualify someone as an expert.

b. The Prosecution's legal authority is inapposite – going either to legal "experts" who apply the law to facts and thus dictate a particular result, or to experts who claim that their testimony is binding law. The Defense's position poses neither of these scenarios. Rather, the Defense seeks to introduce objective and relevant expertise (apart from the facts) as to what the law actually is. Of course, the Commission will ultimately decide for themselves how that law applies to the facts of Mr. Hamdan's case. Once the Defense's position on the use of expert law professors is understood, even the Prosecution's meager precedent falls away.

c. The Prosecution misstates the law for the International Tribunal for the Former Yugoslavia. The rule for admission of expert testimony explicitly permits the testimony of the witnesses identified here. *See Kunarac, Kovac and Vukovic* (IT-96-23) & (IT-96-23/1), 11 Sept. 2000, at 5364-93 (discussed above, where a law professor's testimony as to the elements of the offense of rape were admitted). Rule 94 permits the admission of such testimony provided that it is from "a person whom by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute." Indeed, not only does ICTY refrain from barring the testimony of lawyers, *it has even permitted ICTY's own prosecutors' staff to serve as expert witnesses in cases before the tribunal*. See DECISION CONCERNING THE EXPERT WITNESSES EWA TABEAU AND RICHARD PHILIPPS, 3 July 2002, IT-98-29-T. (The Defense is attaching a copy of that opinion because it is not easily available.)

   i. ICTY has a permissive standard for the testimony of expert witnesses. See Prosecutor v. Brjdanin, decision of June 3, 2003 (http://www.un.org/icty/brdjanin/trialc/decision-e/030603.htm);

see also http://www.un.org/icty/strugar/trialc1/decision-e/040401.htm.

ii. In the case cited by the prosecution, Kordic and Cerkez, IT 95-14/2-T, Transcript (January 28, 2000), the witness was opining as to *facts* showing whether the defendant was guilty. That case did not categorically bar the testimony of law professors, lawyers, or any other legal experts. To do so would violate the longstanding published Rule 94 and decisions such as *Kunarac, Kovac and Vukovic*, and *Tabeu and Phillips*, cited above. In fact, the leading academic analysis of the Prosecution's Kordic case finds that it is distinguishable on precisely this ground. See May & Weirda, supra, at 200-201.

d. The Prosecution misrepresents each of the two main American cases upon which it bases its motion, neither of which is actually relevant to whether the Defense may call its expert witnesses. In *Specht v. Jensen*, 853 F.2d 805, the Court made the narrow finding that an ordinary attorney may not be called as an expert witness in a jury trial to "state his views of the law which governs the verdict and opine whether defendants' conduct violated that law." *Id*. at 806.

e. *Specht* is inapplicable to the present question for three reasons.

i. First, the case concerns an ordinary attorney and not an academic expert in a highly specialized field.

ii. Second, *Specht* and the authority it cites speak to *jury trials*, in which the Court believed an expert testifying as to matters of law might usurp the trial judge's role in instructing the jury. 853 F.2d at 808 ("These courts have decried the latter kind of testimony as directing a verdict, rather than assisting the jury's understanding and weighing of the evidence."). In the Prosecution's misleadingly abbreviated discussion of *Specht*, it tries to obscure the centrality of the jury in that opinion – saying that it decries legal expert testimony because it "creates confusion," Prosec. Motion 5(b), while failing to mention that the body in which it creates confusion is the *jury*, not the judge. The Prosecution also claims that *Specht* rejected expert legal testimony because it could lead to "an inefficient process," though this rationale appears nowhere in the *Specht* decision. Rather, *Specht* objected that competing legal testimony would *confuse a jury*. 853 F.2d at 809. The Defense is calling these witnesses to clarify matters for the Commission, not confuse it. The Defense certainly believes that the Commission will determine ultimate matters of law for itself.

iii. Third, *Specht only* applies when an expert legal witness attempts to apply the law *to the facts of the case*. *Id*.; *see also* United States v. Arutunoff, 1 F.3d 1112, 1118 (10th Cir. 1993) (stating that the case is distinguishable from *Specht* because the expert "did not attempt to apply the law to the facts of the case or otherwise tell the jury how the case should be decided"). To emphasize its limited holding, the *Specht* court declared: "The line we draw here is narrow. We do not exclude all testimony regarding legal issues."

*Id*. at 809. The Defense does not seek to call witnesses who will draw ultimate conclusions on the facts of the case, but rather will explicate legal principles so that the Commission itself may apply those principles to the facts. The Prosecution's motion, which attempts to obscure the limits of *Specht*, is misleading.

f. *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003), is even less applicable to Defense's proposal to *call legal experts*. In *Yousef*, the Court merely rejected the proposition that international law scholars *make* international law – a claim completely unrelated to the Defense's proposal. The Defense does not contend that its proposed experts should go before the Commission to *make* law, but rather to elucidate the law as it currently exists in authoritative documents. *Yousef* itself recognizes the utility of legal experts in this endeavor, stating that scholars "may be useful in explicating or clarifying an established legal principle or body of law." *Id*. at 101. Neither *Specht* nor *Yousef* even remotely supports the categorical ban on legal experts the Prosecution asserts.

g. Expert legal testimony is particularly important given both the structure of the military commission and the claims it will be considering. Structurally, expert witnesses will be crucial in countering the influence of the Presiding Officer over the lay commissioners. The Presiding Officer is the commission's only lawyer; as a result, the lay members of the commission will have a natural tendency to defer to him. Introducing the legal analysis of these scholars by way of expert testimony is an especially helpful way of instructing commission members – a result presumably important for *both* the Prosecution and the Defense; the Defense does not in any way mean to suggest that the Presiding Officer's determinations would be categorically biased against one Party in the upcoming proceedings.

   i. Resisting undue influence on the part of the Presiding Officer is particularly important given that he has already expressed predeterminations of matters of fact and law. For example, the Presiding Officer has stated that the Uniform Code of Military Justice's speedy trial provision does not apply to Mr. Hamdan. That view contradicts over a century of military commission practice, as well as the views of the Pentagon when the issue was last studied, during the Nixon Administration**.** Professor Paust was one of the individuals who studied that issue for the Nixon Administration, and his testimony is highly relevant in countering the stated views of the Presiding Officer.

h. The Commission here can be analogized to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. See testimony of 19 bipartisan law professors in the United States House of Representatives Impeachment of President Clinton, available at http://jurist.law.pitt.edu/hearing.htm (Nov. 9, 1998).

i. The defense believes that this motion to sequester the commission from the leading experts in the field has no legal merit. Furthermore,

denying the commission access to these witnesses creates a tremendous risk that the commission will not reach a full and fair judgment of law. If the Prosecution wants to challenge a particular witness as unqualified, they are free to do so. But to bar wholesale all experts from testifying on a matter as complicated as this does no service to the cause of justice, and violates longstanding principles of Anglo-American jurisprudence.

6. Oral Argument. The Defense believes that this motion, which seeks to bar reams of evidence whose relevance is obvious and provided to the commission, cannot be resolved without oral argument.

7. Legal Authority.

a. Askanase v. Fatjo, 130 F.3d 657 (5th Cir. 1997)
b. The Paquete Habana, 175 U.S. 677 (1900)
c. Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004)
d. Judge Richard May & Marieke Wierda, International Criminal Evidence 208 (2002)
e. Fernandez-Roque v. Smith, 622 F. Supp. 887 (N.D. Ga. 1985)
f. Grupo Protexa, S.A. v. All Am. Marine Slip, 20 F.3d 1224 (3d Cir. 1994)
g. United States v. Royal Caribbean Cruises, 11 F. Supp. 2d 1358 (S.D. Fla. 1998)
h. Navios Corp. v. The Ulysses II, 161 F. Supp. 932 (D. Md. 1958)
i. United States v. New, 50 M.J. 729 (C.C.A. 1999)
j. United States v. Rockwood, 48 M.J. 501 (C.C.A. 1998)
k. Statute of the International Court of Justice, Article 38(1).
l. Huddleston v. Herman & MacLean, 640 F.2d 534 (5th Cir. 1981)
m. Sharp v. Coopers & Lybrand, 457 F. Supp. 879 (E.D. Pa. 1978)
n. United States v. Garber, 607 F.2d 92 (5th Cir. 1979)
o. In re Madeline Marie Nursing Homes, 694 F.2d 433 (6th Cir. 1982)
p. Fed. Rules of Evidence 702.
q. Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993).
r. Specht v. Jensen, 853 F.2d 805 (10th Cir. 1988), *cert. denied,* 488 US 1008 (1989)
s. Fed. R. Evid. 702 advisory committee note
t. Haarhuis v. Kunnan Enters., Ltd., 177 F.3d 1007 (D.C. Cir. 1999)
u. Hayter v. City of Mt. Vernon, 154 F.3d 269 (5th Cir. 1998)
v. *Kunarac, Kovac and Vukovic* (IT-96-23) & (IT-96-23/1), 11 Sept. 2000, at 5364-93, available at http://www.un.org/icty/transe23/000911it.htm.
w. DECISION CONCERNING THE EXPERT WITNESSES EWA TABEAU AND RICHARD PHILIPPS, 3 July 2002, ICTY
x. Prosecutor v. Brjdanin, decision of June 3, 2003 (http://www.un.org/icty/brdjanin/trialc/decision-e/030603.htm)
y. http://www.un.org/icty/strugar/trialc1/decision-e/040401.htm.
z. Kordic and Cerkez, IT 95-14/2-T, Transcript (January 28, 2000)
aa. United States v. Arutunoff, 1 F.3d 1112, 1118 (10th Cir. 1993)
bb. United States v. Ramzi Ahmed Yousef, 327 F.3d 56 (2d Cir 2003)

cc. United States House of Representatives Impeachment of President Clinton, available at http://jurist.law.pitt.edu/hearing.htm (Nov. 9, 1998).

8. Conclusion.

The Defense believes that the Prosecution's motion is precipitous. Barring the testimony of the leading experts in the world as to the law which governs the military commissions risks destroying the credibility of the commission itself, and denying Mr. Hamdan a full and fair trial. Furthermore, the Prosecution's motion risks an enormous expense and inconvenience to the expert witnesses by forcing them to come to Guantanamo and then barring their testimony once they are there.

There is no support in any body of law, either American or foreign, for the categorical exclusion of expert law professors and experts on the Geneva Conventions. On the contrary, the practice of calling legal experts on complicated international and domestic legal matters is widespread in U.S., military, and international courts. The need for such evidence is all the greater in the Guantanamo commissions, for these are bodies that have been set up by the unilateral action of a single individual, and not the Congress of the United States or the international nations at large, where experts and a wide cross-section of accountable decisionmakers have set up architectures to dispense justice. In this case, the unilateral action contravenes longstanding American history, the view of the Founders of our nation, the laws enacted by Congress (including military law), and solemn treaties as to which the United States is a ratified party. The motion should be denied.

Neal Katyal
Civilian Defense Counsel

**UNITED NATIONS**

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| | **International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991** | **Case: IT-98-29-T**<br><br>**Date: 3 July 2002**<br><br>**Original: English** |

**IN THE TRIAL CHAMBER**

**Before:** **Judge Alphons Orie, Presiding**
**Judge Amin El Mahdi**
**Judge Rafael Nieto-Navia**

**Registrar:** **Mr Hans Holthuis**

**Decision of:** **3 July 2002**

**PROSECUTOR**

**v.**

STANISLAV GALIĆ

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# DECISION CONCERNING THE EXPERT WITNESSES EWA TABEAU AND RICHARD PHILIPPS

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**Office of the Prosecutor:** **Counsel for the Defence:**

**Mr. Mark Ierace** **Ms. Mara Pilipovi}**
**Mr. Stéphane Piletta-Zanin**

**TRIAL CHAMBER I, Section B** of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal");

**NOTING** that the Prosecution submitted as statements pursuant to Rule 94 *bis*, a research report called "Population losses in the 'Siege' of Sarajevo 10 September 1992 to 10 August 1994" prepared by Ewa Tabeau, Marcin Zoltkowski and Jakub Bijak filed on 13 May 2002, complemented by two addenda filed on 14 May 2002 and 6 June 2002 and a research report called "Sarajevo Romanija Corps Structure" prepared by Richard Philipps and filed on 17 May 2002; and that the Prosecution expressed its intention to call Ewa Tabeau and Richard Philipps as expert witnesses;

**NOTING** the Motion of the Defence filed on 7 June 2002 ("the Motion"), in which the Defence, having noted that the Rules of Procedure and Evidence of the Tribunal do not define what an expert witness is, argues that Richard Philipps and Ewa Tabeau are not impartial because they are staff members of the Office of the Prosecutor, that the role of expert testimony in criminal proceedings may be crucial to the determinations to be made by a Trial Chamber and that therefore Richard Philipps and Ewa Tabeau disqualify as experts;

**NOTING** the "Prosecution's Response to the Request by the Defence for a Decision Concerning two Expert Witnesses' Reports Submitted under Rule 94 *bis*" dated 17 June 2002 in which the Prosecution responds that (i) the "grounds of objection raised by the

Defence deal with matters relevant to the evaluation of evidence and not admissibility of evidence", (ii) the reports of the witnesses have been prepared on the basis of their expertise and qualifications, not disputed by the Defence, in their respective fields, and (iii) the "contractual relationship that exists between the two Experts Witnesses and the OTP does not render them unreliable";

**CONSIDERING** that, under Rule 94 *bis* (A), "[t]he full statement of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge"; that this Trial Chamber accepts, in accordance with the commonly accepted meaning of this word, an "expert (witness)" to be a person whom by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute (and to that end testifies);

**CONSIDERING** that an expert witness is expected to give his or her expert opinion in full transparency of the established or assumed facts he or she relies upon and of the methods used when applying his or her knowledge, experience or skills to form his or her expert opinion; and that the mere fact that the expert witness is employed by or paid by a party or a party related agency does not disqualify him or her to be called and testify as an expert witness;

**CONSIDERING** that it is to the Trial Chamber to assess the evidentiary value of reports and testimony of expert witnesses taking into account all relevant factors;

**CONSIDERING** that the party calling the expert witness should satisfy the Trial Chamber that the expert witness has at his or her disposal the special knowledge, experience, or skills needed to potentially assist the Trial Chamber in its understanding or determination of issues in dispute;

**CONSIDERING** that the Prosecution has fulfilled this obligation given that Richard Philipps and Ewa Tabeau are well-credentialed; that, in addition, the qualifications of Richard Philipps and Ewa Tabeau in respect of their knowledge, experience or skills are not challenged by the Defence;

**CONSIDERING** that the Defence will have the opportunity to cross-examine the expert witnesses Richard Philipps and Ewa Tabeau; that the Defence is allowed to have its experts present in the courtroom to assist it in understanding the testimony of any expert witness and to prepare for cross-examination in respect of, for instance, the methodology, theory or technique used by the expert to form his or her opinion;

**CONSIDERING** further that the Defence is entitled to submit counter-expertise and to call its own expert witnesses during the presentation of its case;

**FINDING** therefore that the fairness of the trial would not be affected if Ewa Tabeau and Richard Philipps were called as expert witnesses;

**PURSUANT TO** Article 21 of the Statute, and Rules 89 and 94 *bis* of the Rules of Procedure and Evidence;

**FOR THE FOREGOING REASONS,**

**REJECTS** the Motion and **ALLOWS** the Prosecution to call Ewa Tabeau and Richard Philipps as expert witnesses.

Done in English and French, the English version being authoritative.

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Alphons Orie
Presiding Judge

Done this 3rd Day of July 2002
At The Hague,
The Netherlands.

**[Seal of the Tribunal]**